

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-4231

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In The
United States Court of Appeals
For The Second Circuit

ALAN NEMSER and SELMA W. NEMSER,

Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

B
P/S

**APPENDIX FOR
PETITIONERS-APPELLANTS**

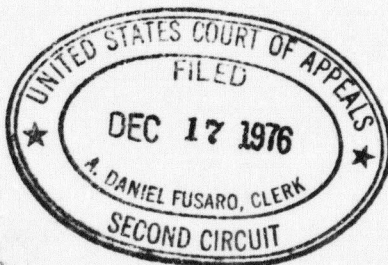
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Joint Appendix

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DOCKET ENTRIES (pp. 1a-2a)
UNITED STATES TAX COURT
GENERAL DOCKET

1a

DOCKET NO. 481-74

ALAN NEMSER AND SELMA W. NEMSER

2833 Harbor Road
Merrick, New York 11566

PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

APPEARANCES FOR PETITIONER:

NAME _____

ADDRESS _____

Date Month Day Year	Filings and Proceedings	Action	Served
Jan. 18, 1974	PETITION FILED: FEE PAID Jan. 18, 1974		Jan. 21, 1974
Mar. 18, 1974	REQUEST by Resp. for Trial at New York, N.Y.	GRANTED Mar. 19, 1974	Mar. 19, 1974
Mar. 18, 1974	ANSWER by Resp. filed.		Mar. 19, 1974
Aug. 22, 1975	NOTICE OF TRIAL On Dec. 1, 1975 at New York, N.Y.		Aug. 22, 1975
Dec. 1 & 3, 1975	TRIAL at New York, NY, before Judge Hall.		
	Stipulation of facts with exhibits, filed 12/3/75. (SERIATIM BRIEFS)		
	PETR. OPENING BRIEF DUE: Jan. 30, 1976		
	RESP. ANSWERING BRIEF DUE: March 30, 1976		
	PETR. REPLY BRIEF DUE: April 29, 1976		
	SUBMITTED TO JUDGE HALL		
Jan. 6, 1976	TRANSCRIPT of Dec. 1, 1975 received.		
Feb. 2, 1976	PETR'S. OPENING BRIEF filed. (PM timely) (C/S 1/29/76)		
Mar. 30, 1976	RESP.'S BRIEF IN ANSWER, filed.		MAR 31 1976
Apr. 30, 1976	PETR.'S BRIEF IN REBUTTAL, filed. (P.M. Timely)		MAY 3 1976
June 10, 1976	ORDER that this case is reassigned from Judge Hall to JUDGE FEATHERSTON for disposition.		JUN 10 1976
July 27, 1976	OPINION filed, Judge Featherston. (Decision will be entered for Resp.)		JUL 27 1976
July 27, 1976	DECISION entered, Judge Featherston.		July 27, 1976
	(Cont. to Page 2)		

[illegible]

STIPULATED FACTS
(pp. 3a-8a)

3a

UNITED STATES TAX COURT

ALAN NEMSER and SELMA W. NEMSER,)	
)	
Petitioners,)	
)	
v.)	Docket No. 481-74
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true. The parties further agree to submit this case as fully stipulated under Rule 122 of the Tax Court's Rules of Practice.

1. At the time of filing the petition herein the petitioners resided at 2833 Harbor Road, Merrick, New York.

2. Petitioners filed a timely Joint United States Individual Income Tax Return for taxable year 1968 with the District Director at Manhattan, New York, a copy of which is attached hereto and marked Exhibit 1-A.

3. During taxable year 1968 petitioner was self-employed as an attorney.

4. Silas J. Llewellyn died a resident of the State of Illinois on September 3, 1925, and his will, a transcription of which is attached hereto and marked Exhibit 2-B, was admitted to probate shortly thereafter by the Probate Court of Cook County.

5. On March 29, 1946, Mary Isabelle Llewellyn, the daughter and only child of Silas J. Llewellyn's son, Paul, sold, assigned and transferred to the Fidelity Philadelphia Trust Company, as nominee for Richard Kadish, Irving Poretz and Aaron Miller, all of her right, title and interest in and to $\frac{3}{4}$ of the share, right, title and interest in and to the corpus of the estate of Silas J. Llewellyn, which would become payable to her in the event that her aunt, Gertrude Stone, should die without issue surviving. The interest thus assigned is otherwise expressed as $\frac{3}{4}$ of $\frac{1}{2}$ of $\frac{1}{3}$ of the total Silas J. Llewellyn estate.

6. The consideration for the transfer described in 5, above, was \$31,500.00, of which \$14,000.00 was paid by Richard Kadish, \$14,000.00 by Irving Poretz and \$3,500.00 by Aaron Miller, and the Fidelity Philadelphia Trust Company acknowledged on April 11, 1946, that it held said assignment in its name for their benefit, in the following proportions:

Richard Kadish	4/9
Irving Poretz	4/9
Aaron Miller	1/9

7. Neither the petitioner nor Richard Kadish, Irving Poretz or Aaron Miller were named as beneficiaries in the will of Silas J. Llewellyn.

8. On April 17, 1946, Richard Kadish sold, assigned and transferred to petitioner herein, Alan Nemser, 3/14ths of his said 4/9th interest, for and in consideration of the payment to Richard Kadish of the sum of \$3,000.00.

9. The petitioner's purchase of the 3/14ths interest in the Kadish 4/9th interest was made for investment purposes.

10. Paul Llewellyn, son of Silas J. Llewellyn, died on January 10, 1956, survived by his only child, Mary Isabelle Llewellyn. Gertrude Stone, daughter of Silas J. Llewellyn, died on April 14, 1956, leaving no issue.

11. On June 22, 1956 the City National Bank and Trust Company, Trustee under the Will of Silas J. Llewellyn, deceased, (subsequently known as Continental Illinois National Bank and Trust Company of Chicago) filed its amended complaint in the Superior Court, Cook County, Illinois, asking for instructions concerning the distribution of that portion of the estate which was distributable upon the death of Gertrude Stone and asking the Court to pass upon the validity of assignments of her remainder interest therein theretofore made by Mary Isabelle Llewellyn.

12. Petitioner herein, Alan Nemser, was named as a defendant and served with process in the said suit brought by the Trustee and was described therein as a person claiming distribution as an assignee of Richard Kadish, one of the original purchasers of the interest purchased on March 29, 1946.

13. On June 6, 1966, the Appellate Court of the State of Illinois rendered its decision in which it was determined that the March 29, 1946 assignment by Mary Isabelle Llewellyn was valid and enforceable and that, pursuant to said assignment, petitioner herein, Alan Nemser, as an assignee, was entitled to distribution of his pro rata portion of the assets.

14. A copy of the opinion of the Appellate Court of the State of Illinois in regard to the Llewellyn trust and the assignment made by Mary Isabelle Llewellyn is attached hereto and marked Exhibit 3-C.

15. On December 21, 1967, acting under the mandate of said Appellate Court decision, the Circuit Court of Cook County entered its Decree, which directed, among other things,

Decree, Par. 16. "For purposes of making a segregation, allocation and distribution in cash and in kind under this decree, plaintiff shall create the following distribution shares:

Richard Kadish, et al.

66 and 2/3%
of Mary I.
Llewellyn-Stone
fund

.
Decree Par. 17. "The interests in the Richard Kadish, et al. Distribution share are as follows:"

Richard Kadish	19.6429%
Max Kadish	19.6429%
Alan Nemser	10.7142%
Florence Poretz, individually and as attorney in fact for Carol R. Poretz and Stephanie Poretz	25.0000%
Elliot L. Krause, as trustee for the bene- fit of Creditors of Metropolitan Machine Shops, Inc., bankrupt	<u>25.0000%</u> 100.0000%

A copy of the decree is attached hereto and marked Exhibit 4-D.

16. The fund available for distribution to the above-named persons entitled to distribution of the Richard Kadish, et al share was, as listed and stated in the Decree, \$725,046.29.

17. In the year 1968, the Richard Kadish, et al share was distributed to the above-named persons, after first deducting trustees fees, attorneys fees and expenses as allowed by the Court for the final year of the trust.

18. The petitioner received, as a distribution from the trust upon termination, stocks having a fair market value of \$55,788.16.

19. The trustee reported that, according to its accounts, with respect to the funds held by it for distribution to the

persons entitled to distribution in the Kadish, et al share, the amount of deductible expenses in excess of income for the year 1968, the terminal year of the trust, was \$134,346.15.

20. The share of such excess claimed by the petitioner, Alan Nemser, was 10.7142 per cent of \$134,346.15, namely, \$14,394.12.

21. The amount potentially available for distribution to petitioner, Alan Nemser, out of said Richard Kadish, et al fund, as described, listed and identified by the Illinois Court in its Decree of December 21, 1967 was reduced by said sum of \$14,394.12.

IT IS FURTHER STIPULATED AND AGREED that, upon the foregoing statement of facts, the issue to be presented to the Court herein will be whether petitioner is a "beneficiary succeeding to the property of the estate or trust" within the purview and meaning of Int. Rev. Code of 1954, §642(h)(2), so as to entitle him to take as a deduction against his personal income his pro rata share of the unused deductions in the terminal year of the trust.

Alan Nemser
ALAN NEMSER

Selma W. Nemser
SELMA W. NEMSER
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Merrick, New York

MEADE WHITAKER
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Internal Revenue Service

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OPINION OF THE TAX COURT
(pp. 9a-20)

66 T. C. No. 71

UNITED STATES TAX COURT

ALAN NEMSER and SELMA W. NEMSER, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 481-74.

Filed July 27, 1976.

Held, the phrase "beneficiaries succeeding to the property of the estate or trust," as used in sec. 642(h), I.R.C. 1954, does not include a purchaser of an interest in a testamentary trust.

Alan Nemser, pro se.

Theodore M. David, for the respondent.

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OPINION

FEATHERSTON, Judge: Respondent determined a deficiency of \$6,782.32 in petitioners' 1968 Federal income tax. The parties have stipulated that the issue for decision is whether petitioner Alan Nemser is a beneficiary succeeding to the property of a trust within the meaning of section 642(h)(2)^{1/} so as to entitle him to take as a deduction against his personal income his pro rata share of the unused deductions in the terminal year of the trust.

The facts are all stipulated.

Petitioners Alan Nemser and Selma W. Nemser were legal residents of Merrick, New York, at the time their petition herein was filed. They timely filed their joint Federal income tax return for 1968 with the District Director of Internal Revenue, Manhattan, New York.

^{1/}

All section references are to the Internal Revenue Code of 1954, as in effect during the tax year in issue, unless otherwise noted.

During 1968 petitioner Alan Nemser (hereinafter petitioner) was a practicing, self-employed attorney. The present controversy stems from his purchase of an interest in a testamentary trust created by Silas J. Llewellyn, who died a resident of Illinois on September 3, 1925.

Under the terms of the trust created by the will of Silas J. Llewellyn, Mary Isabelle Llewellyn, a granddaughter of the testator, received a remainder interest. The extent of her interest was contingent upon her father's (Paul Llewellyn's) dying without surviving issue other than herself, and her aunt's (Gertrude Stone's) dying without issue.

On March 29, 1946, Mary Isabelle Llewellyn sold, assigned, and transferred to the Fidelity Philadelphia Trust Company, as nominee for Richard Kadish, Irving Poretz, and Aaron Miller (hereinafter the Richard Kadish group), all of her interest in a fractional portion of her interest in the Gertrude Stone portion of the trust. The consideration for the transfer was \$31,500, of which \$14,000 was paid by Richard Kadish, \$14,000 by Irving Poretz, and \$3,500 by Aaron Miller.

On April 11, 1946, the Fidelity Philadelphia Trust Company acknowledged that it held the assigned portion of the trust in its name for their benefit, in the following proportions:

Richard Kadish	4/9
Irving Poretz	4/9
Aaron Miller	1/9

Neither petitioner nor any one of the Richard Kadish group was named as a beneficiary in the will of Silas J. Llewellyn.

On April 17, 1946, Richard Kadish sold and transferred to petitioner $3/14$ of his $4/9$ interest in Silas J. Llewellyn's trust estate for the sum of \$3,000. Petitioner's purchase of the $3/14$ interest in the Kadish $4/9$ interest was made for investment purposes.

In 1956 both Paul Llewellyn and Gertrude Stone died. He left no issue other than Mary Isabelle Llewellyn, and Gertrude Stone died without issue. Shortly after their deaths the City National Bank and Trust Company, trustee under the will of Silas J. Llewellyn, filed an action in the Superior Court, Cook

County, Illinois, asking for instructions concerning the disposition of that portion of the estate which was distributable upon the death of Gertrude Stone. The court was also requested to pass upon the validity of the assignments made by Mary Isabelle Llewellyn of portions of her remainder interest. Petitioner was named as one of the defendants and was described as a person claiming distribution as an assignee of Richard Kadish.

The Appellate Court of the State of Illinois rendered its decision on June 6, 1966, holding that the March 29, 1946, assignment by Mary Isabelle Llewellyn to the Richard Kadish group was valid and enforceable and that, pursuant to the assignment, petitioner, as an assignee of Richard Kadish, was entitled to distribution of his pro rata portion of the trust estate's assets. The fund available for distribution to the Richard Kadish group and their assignees was \$725,046.29. During 1968 the Richard Kadish group's share was distributed to the individuals named in the court decree, after first deducting trustee's fees, attorneys' fees, and expenses as allowed by the court

for the final year of the trust. Petitioner received as his share stocks having a fair market value of \$55,788.16.

The trustee reported that for 1968, the year of the termination of the trust, deductible expenses exceeded income by \$134,346.15 for the Richard Kadish group's portion of the trust estate. Of this excess amount petitioner claimed \$14,394.12 as a deduction on his 1968 joint Federal income tax return, representing his 10.7142-percent share of the Richard Kadish group's portion of the trust estate. Respondent disallowed the deduction on the ground that petitioner was not a beneficiary of the trust within the meaning of section 642(h)(2).^{2/}

^{2/}

SEC. 642. SPECIAL RULES FOR CREDITS AND DEDUCTIONS.

(h) Unused Loss Carryovers and Excess Deductions on Termination Available to Beneficiaries.--If on the termination of an estate or trust, the estate or trust has--

* * *

(2) for the last taxable year of the estate or trust deductions (other than the deductions allowed under subsections (b) or (c)) in excess of gross income for such year,

continued

Petitioner maintains that the term "beneficiaries," as used in section 642(h)(2), should be construed broadly so as to include any person to whom property is distributed from an estate or trust, whether or not that person was designated as a beneficiary under the terms of the testator's will. In support of his position, petitioner relies on section 1.642(h)-3(a), Income Tax Regs., which provides:

The phrase "beneficiaries succeeding to the property of the estate or trust" means those beneficiaries upon termination of the estate or trust who bear the burden of any loss for which a carryover is allowed, or of any excess of deductions over gross income for which a deduction is allowed, under section 642(h).

Petitioner argues that the regulation establishes that if, in the year of termination of a trust, the expenses of the trust exceed the trust's income, section

Footnote 2--continued

then such carryover or such excess shall be allowed as a deduction, in accordance with regulations prescribed by the Secretary or his delegate, to the beneficiaries succeeding to the property of the estate or trust.

642(h)(2) allows the excess expenses as deductions to any distributee whose share is diminished by those expenses. We disagree.

The regulation relied upon by petitioner provides no real help in ascertaining the meaning of the term "beneficiaries," as used in section 642(h)(2). In reality this definition begs the question we must decide. It defines "beneficiaries succeeding to the property of the estate or trust" as those beneficiaries who bear the burden of any loss or any excess of deductions over gross income. It does not give any clue as to whether purchasers of interests in an estate or trust are beneficiaries within the meaning of section 642(h)(2).

Section 642(h) was enacted by Congress to allow beneficiaries succeeding to the property of an estate or trust to deduct in the terminal year of the estate or trust unused loss carryovers and expenses in excess of the estate's or trust's income; otherwise, those deductions would be forever lost. H. Rept. No. 1337, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess. 62, A201 (1954); S. Rept. No. 1622, to accompany

H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess. 83, 343 (1954); see Charles F. Neave, 17 T.C. 1237, 1240-1243 (1952), for a discussion of the prior law. The use of the phrase "beneficiaries succeeding to the property" (emphasis added) indicates that the section was intended to refer only to recipients of property by bequest, devise, or inheritance under State succession laws. The amount of the property so received by will or inheritance under State law is not includable in gross income by virtue of section 102^{3/} but is reduced by losses and expenses incurred by the estate.

3/

SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.--Gross income does not include the value of property acquired by gift, devise, or inheritance.

(b) Income.--Subsection (a) shall not exclude from gross income--

(1) the income from any property referred to in subsection (a); or

(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

Where, under the terms of the gift, bequest, devise, or inheritance, the payment, crediting, or distribution thereof is to be made at intervals, then, to the extent that it is paid or

continued

Thus, without section 642(h)(2), the distribution to the beneficiaries succeeding to the property would be decreased, but they would receive no deduction for the amount of such decrease.

By entering the transaction with Mary Isabelle Llewellyn, however, the Richard Kadish group acquired nothing by bequest, devise, or inheritance. Whatever that group acquired was by purchase, and what they purchased was a fractional portion of the trust principal remaining after the losses and administration expenses of the trust had been taken into account. They acquired no income rights. It is stipulated that Mary Isabelle Llewellyn "sold, assigned and transferred" to the nominee of the Richard Kadish group (of which petitioner was an assignee) "her right, title and interest in and to 3/4 of the share, right, title and interest

Footnote 3--continued

credited or to be distributed out of income from property, it shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property. Any amount included in the gross income of a beneficiary under subchapter J shall be treated for purposes of paragraph (2) as a gift, bequest, devise, or inheritance of income from property.

in and to the corpus of the estate of Silas J. Llewellyn, which would become payable to her in the event that her aunt, Gertrude Stone, should die without issue surviving." (Emphasis added.) None of the corpus of the trust would "become payable" to Mary Isabelle Llewellyn until after the expenses of its administration and liquidation had been paid. Petitioner, therefore, did not bear the burden of any of those expenses. As a purchaser of a portion of the trust estate remaining after the expenses were paid, he was in no sense a beneficiary succeeding to the property of the trust.

In Greggar P. Sletteland, 43 T.C. 602 (1965), this Court rejected the notion that the term "beneficiaries," as used in section 642(h), includes purchasers of interests in estates or trusts. In that case a taxpayer acquired an interest in an estate in consideration of legal services rendered to a client. This Court concluded (pp. 609-610) that the taxpayer "acquired the claims property, not in the capacity of a beneficiary of an estate, but rather as an attorney for services rendered to a client" and was not entitled to

a deduction for the estate's expenses over gross income in the estate's terminal year. We also said at 610:

* * * it seems evident that the underlying purpose of section 642(h) was to afford some measure of relief to heirs and those designated as takers under a decedent's will, who take diminished interests in a decedent's property as the result of the incurrence of expenses and losses by the estate. * * *

We adhere to the Sletteland opinion.

To reflect the foregoing,

Decision will be entered
for the respondent.

A 201 Affidavit of Service by Mail
**COURT OF APPEALS
SECOND CIRCUIT**

LUTZ APPELLATE PRINTERS, INC.

ALAN NEIMSER and SELMA W. NEIMSER,

Petitioners-Appellants,

- against -

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

Index No.

Affidavit of Service by Mail

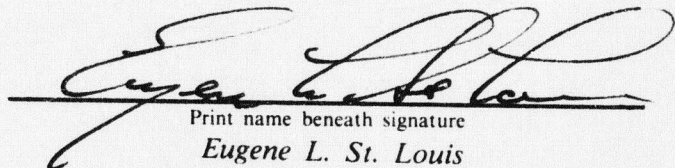
STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Eugene L. St. Louis, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1235 Plane Street, Union, New Jersey 07083. That on the 17th day of December 1976, deponent served the annexed Appendix

upon Gilbert E. Andrews, Chief, Appellate Section attorney(s) for
Resp-Appellee in this action, at
U.S. Department of Justice Washington, D.C. 20530
the address designated by said attorney(s) for that
purpose by depositing 3 true copies of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 17th
day of December 1976

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4028100
Qualified in Queens County
Commission Expires March 30, 1978


Print name beneath signature
Eugene L. St. Louis